National Labor Relations Board



Weekly Summary of NLRB Cases

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CASES SUMMARIZED VISIT WWW.NLRB.GOV FULL TEXT

Aircraft Services International, Inc.	Pittsburgh, PA	1
Clarke Manufacturing, Inc.	Milwaukee, WI	2
Desert Springs Hospital Medical Center	Las Vegas, NV	3
Foundation Coal West, Inc.	Gillette, WY	3
Harmon Auto Glass	Minneapolis, MN	4
Longshoremen Local 10	San Francisco, CA	4
<u>Lorge School</u>	New York, NY	5
Ralphs Grocery Co.	Los Angeles, Ca	5

OTHER CONTENTS

List of Decisions of Administrative Law Judges	6
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List of Unpublished Board Decisions and Orders in Representation Cases	6
 Contested Reports of Regional Directors and Hearing Officers 	
 Uncontested Reports of Regional Directors and Hearing Officers 	
Miscellaneous Board Decisions and Orders	

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Aircraft Services International, Inc. (6-RC-12497; 352 NLRB No. 23) Pittsburgh, PA Feb. 20, 2008. The Board dismissed the Union's petition for an election, finding that the Employer, a company that provides aviation-related ground services for various air carriers at the Pittsburgh International Airport, falls within the jurisdiction of the National Mediation Board (NMB) under the Railway Labor Act (RLA) rather than the Board. [HTML] [PDF]

Upon the Board's June 1983 certification, the Union became the representative of a unit of all non-supervisory employees of the Employer at the Pittsburgh International Airport. On May 24, 2005, the Region dismissed an unfair labor practice charge filed by the Union against the Employer on the basis that the Board lacked jurisdiction. The Employer ceased recognizing the Union and terminated the collective-bargaining relationship. The Union filed an election petition. At the ensuing hearing, the parties stipulated to the appropriateness of the Union's amended unit description: "all full-time and regular part-time fuelers, GSE (ground service equipment) mechanics, tank farm operators, ground handlers and associated leads." The Employer, however, asserted that its operations and employees are subject to the RLA and within the jurisdiction of the NMB rather than the Board. Following the hearing, the Regional Director transferred the proceeding to the Board.

On Jan. 13, 2006 the Board requested the NMB to study the record and determine the applicability of the RLA to the Employer. On May 11, 2006, the NMB issued an opinion finding that the Employer and its employees are subject to the RLA. *Aircraft Services International Group, Inc.*, 33 NMB 200.

The Board found that the unit employees provide a variety of airport ground handling or "ramp" services, preventive maintenance and repairs, and fueling services. Employees must be trained and certified in the policies and procedures of the particular carrier to which they are assigned. Certifications are maintained through required, on-going training. Each carrier conducts at least a yearly audit of the Employer's operations, with the right to access records, observe and interview employees, and examine equipment. Post-audit reports may require the Employer to take corrective action to ensure continuation of the contract. Carriers provide the Employer with its schedules which, in turn, affect the scheduling of employees to carry out necessary functions. A consortium of 11 air carriers leases a fuel tank farm facility and provides all needed equipment and supplies, as well as pays all costs, including wages, for the Employer's employees to provide fueling services for their aircraft. The consortium actively participates in the Employer's tank farm budget process and has final approval over staffing levels there.

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. Sec. 152(2). Similarly Section 2(3) of the NLRA provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. Sec. 152(3). The RLA applies, *inter alia*, to "[e]very common carrier by air engaged in interstate or foreign commerce, and . . . every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers subject to its or their continuing authority to supervise and direct the manner or rendition of his service. 45 U.S.C. Sec. 151 First and 181.

The NMB uses a two-pronged "function and control" test to determine whether it has jurisdiction over an employer that is not a common carrier. To assert jurisdiction, it must be determined both that: (1) the work is traditionally performed by employees of air and rail carriers; and (2) a common carrier exercises direct or indirect ownership or control. The parties stipulated that the Employer satisfied the first prong. Among the factors found to exist related to the second prong are: indirect, but substantial, control by carriers over staffing levels and the hours worked by ground service employees; carrier imposition of training requirements and operating procedures; and, with respect to the fueling operations, direct control by the carrier-composed consortium over labor and benefits costs because of its participation the Employer's budget process. Thus, finding the second prong has also been satisfied, the Board agreed with the NMB and concluded that the Employer falls under the RLA and within the jurisdiction of the NMB rather than that of the NLRB.

(Members Liebman and Schaumber participated.)

Clarke Manufacturing, Inc. (30-CA-17472; 352 NLRB No. 25) Milwaukee, WI Feb. 20, 2008. The Board adopted the administrative law judge's findings that the Respondent did not violate Section 8(a)(5) and (1) of the Act by prematurely declaring an impasse in bargaining and by unilaterally replacing the United Healthcare plan for its employees with a plan referred to as the Federated Plan #5677. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by submitting, without a tenable explanation, a regressive proposal to eliminate the collective-bargaining agreement's longstanding union security provision. The Board, however, found it unnecessary to pass on the judge's additional finding that the Respondent violated Section 8(a)(5) by submitting a regressive proposal to terminate participation in the Union's pension fund as any such finding would be cumulative and would not materially affect the remedy. [HTML] [PDF]

In this case, the parties held eight negotiation sessions and the Respondent declared impasse after the sixth meeting. The Respondent made it clear from the beginning of the negotiations that health insurance was a major issue because it needed to reduce its health care costs and therefore, the negotiations hinged on an acceptable insurance policy. The parties remained deadlocked on the issue of healthcare throughout the negotiations and were unable to overcome their differences. The Board affirmed the judge's finding that the parties reached impasse because they were simply unable to resolve the health care issue and any agreements on other issues would not have resolved the impasse.

(Members Liebman and Schaumber participated.)

Charge filed by Steelworkers Local 2-200; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Milwaukee on Oct. 25, 2006. Adm. Law Judge Karl H. Buschmann issued his decision April 10, 2007.

Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center (28-CA-20805, et al.; 352 NLRB No. 16) Las Vegas, NV Feb. 19, 2007. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully issuing three disciplinary warnings to Registered Nurse Christina Schofield and unlawfully discharging her because of her protected concerted activities in support of the Union. The Board also adopted the judge's dismissal of the allegation that the Respondent unlawfully revoked Schofield's privilege to park in the physicians' parking lot. [HTML] [PDF]

In a footnote, Member Schaumber expressed his position that, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must show a causal nexus between a Respondent's union animus and its allegedly unlawful action to establish a prima facie case and shift the rebuttal burden to the Respondent. Member Schaumber also expressed his position that an employer's failure to conduct a meaningful investigation of the alleged wrongdoing of an employee who is under scrutiny and the failure to give the employee an opportunity to explain his or her conduct is not necessarily an indication of discriminatory intent. Rather, such a failure *may* be evidence of discriminatory intent if it reflects disparate treatment of the individual at issue. If the employer regularly fails to engage in what the Board considers to be a "meaningful" investigation of employee wrongdoing, then its failure to engage in such an investigation in a particular instance reveals little about discriminatory motive.

(Members Liebman and Schaumber participated.)

Charges filed by Nevada Service Employees Local 1107; complaint alleged violations of Section 8(a)(3) and (1). Hearing at Las Vegas, April 17-18, 2007. Adm. Law Judge Lawrence W. Cullen issued his decision July 12, 2007.

Foundation Coal West, Inc. (27-CA-20202, 20295; 352 NLRB No. 22) Gillette, WY Feb. 21, 2008. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from distributing union literature in a hallway and violated Section 8(a)(3) by disciplining two employees for distributing union literature there. In affirming those findings, the Board reasoned that the hallway was a mixed use area in which extensive nonwork activities, such as dining and socializing occurred. [HTML] [PDF]

(Members Liebman and Schaumber participated.)

Charges filed by Mine Workers; complaint alleged violations of Section 8(a)(3) and (1). Hearing at Gillette, April 18-19, 2007. Adm. Law Judge John J. McCarrick issued his decision Aug. 30, 2007.

Leiferman Enterprises, LLC d/b/a Harmon Auto Glass (18-CA-18134; 352 NLRB No. 24) Minneapolis, MN Feb. 21, 2008. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with requested information about health care contributions, Respondent's financial condition, and by unilaterally implementing the terms of its final offer. [HTML] [PDF]

The Board reversed the judge and dismissed an allegation that the Respondent had unlawfully refused to furnish the Union with requested information about the Respondent's merit pay proposal. Also, the Board reversed the judge and found that the Party in Interest, the Respondent's State court-appointed receiver, was not the Respondent's agent and therefore not personally financially liable to remedy the Respondent's unfair labor practices.

With respect to the unilateral implementation, the Board found that the Respondent's unlawful refusals to furnish requested information precluded the finding of a genuine bargaining impasse, that, in any event, the Respondent failed to prove that the parties reached a genuine impasse, and finally that the Respondent failed to prove that its unilateral action was excused by an unforeseen economic exigency.

(Members Liebman and Schaumber participated.)

Charge filed by Painters District Council 82; complaint alleged violations of Section 8(a)(5) and (1). Hearing at Minneapolis, Jan. 25-26, 2007. Adm. Law Judge Jane Vandeventer issued her decision July 20, 2007.

Longshoremen Local 10 (20-CD-739; 352 NLRB No. 21) San Francisco, CA Feb. 22, 2008. In this jurisdictional dispute, the Board found reasonable cause to believe that the Respondent, Longshoremen Local 10, violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing CEMEX Construction Materials, L.P. (the Employer) to assign the work in dispute to workers it represents rather than to the Employer's own employees represented by Operating Engineers Local 3.[HTML] [PDF]

The work in dispute is the operation of a bucket loader aboard a barge, moored at a commercial pier, to put bulk aggregate rock and sand into a hopper on the barge which then deposits the material onto a conveyor belt that carries it to the Employer's ready-mix concrete manufacturing plant located on property adjacent to the pier.

After considering all the relevant factors, the Board concluded that employees represented by Local 3 are entitled to continue performing the work in dispute based on the factors of collective-bargaining agreement, employer preference, and economy and efficiency of operations.

(Members Liebman and Schaumber participated.)

The Lorge School (2-CA-37967; 352 NLRB No. 17) New York, NY Feb. 19, 2008. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by discharging supervisor Linda Cooperman because she refused to assist in committing unfair labor practices. However, the Board did not rely on several pieces of evidence, upon which the judge had relied, to show the Respondent's animus. [HTML] [PDF]

The Board amended the remedy set out by the judge by requiring the Respondent to offer Cooperman reinstatement. In a footnote, Member Schaumber agreed that extant Board law requires Cooperman's reinstatement to remedy the Respondent's unfair labor practice. However, he questioned the policy that compels Board interference with management decisions regarding high-level supervisors.

(Members Liebman and Schaumber participated.)

Charge filed by Linda Cooperman, an Individual; complaint alleged violations of Sections 8(a)(1). Hearing at New York, May 30-31 and June 1 and 13, 2007. Adm. Law Judge Raymond P. Green issued his decision Aug. 3, 2007.

Ralphs Grocery Co. (31-CA-27160 et al.; 352 NLRB No. 18) Los Angeles, CA Feb. 19, 2008. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Unions with information regarding the Respondent's hiring of unit employees under false names and social security numbers during a lockout. In rejecting the Respondent's contention that the Unions' sole purpose in requesting the information was to support unfair labor practice charges, the Board relied solely upon the fact that the Respondent did not challenge some of the judge's findings regarding this issue. [HTML] [PDF]

The Board also found that the judge erred in deferring to compliance the Respondent's contention that an audit conducted by the Respondent's law firm was within the attorney work-product privilege; the Board then found that the audit information was within the privilege and that a balancing of competing interest supported non-disclosure of the audit information.

(Members Liebman and Schaumber participated.)

Charges filed by Food and Commercial Workers Locals 135, 324, 770, 1036, 1167, 1428, 1442; complaint alleged violation of Section 8(a)(5). Hearing at Los Angeles on Feb. 27, 2007. Adm. Law Judge Lana H. Parke issued her decision June 14, 2007.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Sud-Chemie, Inc. (an Individual) Louisville, KY Feb. 21, 2008. 9-CA-43779; JD(ATL)-06-08, Judge William N. Cates.

Santa Fe Healthcare, LLC d/b/a Villa Maria Elena Healthcare Center (Service Employees Local 434B) Compton, CA Feb. 22, 2008. 21-CA-37593; JD(SF)-06-08, Judge Lana H. Parke.

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following case, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Jansen Road Nursing & Rehabilitation Center, LLC, d/b/a Mountain View Nursing and Rehabilitation Centre, New Paltz, NY, 3-RC-11766, Feb. 21, 2008 (Members Liebman and Schaumber)

(In the following case, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Waste Management of Michigan, Inc., d/b/a Waste Management of Flint, Lennon, MI, 7-RD 3588 Feb. 21, 2008

Miscellaneous Board Decisions and Orders

ORDER [denying Union's motion to reopen the record]

Edw. C. Levy Co. d/b/a The Levy Co., Portage, IN, 25-RD-1490, Feb. 21, 2008 (Members Liebman and Schaumber)
